ARBITRATION TRIBUNAL

Constituted by virtue of *Regulation respecting the guarantee plan for new residential buildings*
(O.C. 841-98 of 17 June 1998)

Under the aegis of
CENTRE CANADIEN D'ARBITRAGE COMMERCIAL (CCAC)
CANADIAN COMMERCIAL ARBITRATION CENTRE (CCAC)
Arbitration body authorized by the *Régie du Bâtiment du Québec* responsible
for the administration of the Building Act (R.s.Q., c. B-1.1)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

File QH: 20440-1
File CCAC: S08-061101-NP

NEOPHYTOS CHRISTOU & SYLVIA BEHNK
"**Beneficiaries**" / Appellants

v.

GROUPE IMMOBILIER CLÉ D'OR INC.
"**Contractor**" / Defendant

and

LA GARANTIE HABITATIONS DU QUÉBEC INC.
"**Manager**"

ARBITRATION AWARD

Arbitrator:	Me Jean Philippe Ewart
For the Beneficiaries:	Mrs. Sylvia Behnk Mr. Neophytos Christou
For the Contractor:	Mr. Yves Bertrand, President Mr. Ian Popik, Production manager
For the Manager:	Me Avelino de Andrade, counsel (La Garantie Habitations du Québec Inc.) Mr. Normand Pitre, Conciliator
Date of Hearing:	26 January 2009
Hearing location:	CCAC offices, Montreal
Date of Award:	2 February 2009

IDENTIFICATION OF THE PARTIES

"**BENEFICIARIES**"/ APPELLANTS: NEOPHYTOS CHRISTOU & SYLVIA BEHNK
1167 rue du Phare
Laval (Québec)
H7R 6H5

"**CONTRACTOR**" /DEFENDANT: GROUPE IMMOBILIER CLÉ D'OR INC.
431 rue Séguin
Fabreville (Québec)
H7R 6G2

"**MANAGER**" OF THE GUARANTEE PLAN: LA GARANTIE HABITATIONS DU QUÉBEC INC.
7400 boul. des Galeries-d'Anjou
Bur. 200, Anjou (Québec)
H1M 3M2

MANDATE

A request for arbitration was filed by the Beneficiaries dated 03 November 2008 and the undersigned was named arbitrator on 12 November 2008.

CHRONOLOGY

2003.10.18	Preliminary contract and Mandatory guarantee (the "**Contract**"). (Exhibit A-4)
2004.05.04	Inspection – Pre Acceptance. (Exhibit A-3)
2005.04.04	Correspondence from Beneficiaries to Contractor re. work to be completed and repaired. (Exhibit B-1)
2006.10.26	Contractor Request form for Service. (Exhibit B-2)
2008.06.17	Registered Letter of claim from Beneficiaries to Contractor (Exhibit A-6 *en liasse*).
2008.08.04	Beneficiaries' transmission letter of the Beneficiaries' Claim to the Manager, with Manager receipt stamp dated 06 August 2008. (Exhibit A-5)
2008.08.26	Letter from Manager to Contractor. (Exhibit A-6)
2008.10.15	"Rapport d'inspection" – Decision by the Manager. (Exhibit A-2)
2008.11.03	Letter of request for arbitration from Beneficiaries to CCAC. (Exhibit A-1 *en liasse*)
2008.11.06	Notification of Arbitration request. (Exhibit A-1 e*n liasse*)
2008.11.12	Nomination of Arbitrator.
2008.11.20	Letter from Beneficiaries to Arbitrator.
2008.11.28	Notice of Pre trial conference.
2008.12.02	Letter from Beneficiaries to Parties (with Exhibits B-1 and B-2).
2008.12.17	Pre trial conference.
2008.12.17	Notice of preliminary hearing.
2009.01.26	Preliminary Hearing.

EXHIBITS

By consent, Exhibits have been initially labeled and numbered "A-" in accordance with the numbering of the Book of Exhibits filed by the Manager and any other additional exhibits which the Beneficiaries filed following the pre trial conference were numbered and labeled "B-". Furthermore, the following Exhibits were filed by the Manager at the Hearing:

A-5: Beneficiaries' transmission letter of the Beneficiaries' Claim to the Manager, with Manager receipt stamp dated 6 August 2008;

A-6 (*en liasse*): Notice to Contractor in accordance with section 18 of the *Regulation respecting the guarantee plan for new residential buildings*[1] (the "**Regulation**").

FACTS AND PROCEEDINGS

[1] This is a request for arbitration from a decision of the Manager (# 2216) entitled "*Rapport d'inspection*" dated 15 October 2008 (the "**Decision**") (Exhibit A-2) rendered in furtherance of claims by the Beneficiaries under the Guarantee Contract entered into on 18 October 2003 (Exhibit A-4) providing for coverage in accordance with the terms and conditions under a Guarantee Plan for new residential buildings (the "**Guarantee Plan**") administered by the Manager for their residence for which evidence shows there was acceptance of the building on 5 May 2004. The Beneficiaries expressed a preference to have the arbitration proceedings in English.

[2] A visit by an inspector of the Manager was effected on 10 September 2008.

[3] There are four (4) points ("**Point**(**s**)") covered by and as numbered under the Decision:

1. Deterioration of two columns situated in the front of the house;
2. Cracks in the bricks above the garage door;
3. Missing Tile/Shingle on the roof above the front columns;
4. Heat Pump operation.

[4] The Decision states that, for purposes of Points 1, 2 and 3, the defects under review must be denounced in writing to the Contractor and the Manager within a reasonable delay, which delay cannot exceed six (6) months of their discovery or happening and that, in the circumstances, this delay was expired for each such Point.

[5] The Decision further states that, for purposes of Point 2, 3 and 4, the delay for Guarantee Plan coverage for latent defect of three (3) years was expired and therefore coverage could only be considered if these were respectively a construction defect, which the Decision considered that

[1] O.C. 841-98 of 17 June 1998, (R.S.Q. Ch. B-1.1, r.0.2.), Building Act (R.S.Q., c. B-1.1).

each was not, and consequently that the Guarantee Plan does not find application.

[6] The Decision further states that Point 4, which refers to a heat pump and identifies that the Beneficiaries proceeded with repairs prior to the inspection by the Manager, falls under an exclusion of guarantee under the Guarantee Plan in accordance with subsection 6.7.3 of the Contract, which provides that:

> "The following are EXCLUDED from the guarantee:
> …
> 6.7.3. Repairs made necessary by fault of the Beneficiary, such as inadequate maintenance or misuse of the building, as well as those resulting from alterations, deletions or additions made by the Beneficiary"

and consequently that the Guarantee Plan does not find application, while the Tribunal notes that such text is similar to section 12(3) of the Regulation which states:

> "The guarantee excludes:
> …
> (3) repairs made necessary by a fault of the beneficiary, such as inadequate maintenance or misuse of the building, as well as by alterations, deletions or additions made by the beneficiary".

[7] The problems in the case at bar were denounced in writing to the Contractor on 6 June 2008, with an indication under correspondence from the Beneficiaries to the Contractor for Point 2 (cracks in the bricks) that there had been an intervention by the Contractor during the prior year:

> "…cracks in the bricks and foundation. Last year you patched it up, but again the cracks are there and bigger" (Exhibit A-6),

while the Manager was first given notice in writing of each of these points on 6 August 2008.

PRELIMINARY MOTIONS

[8] There were no motions as to competence or jurisdiction and jurisdiction of the Court was therefore confirmed.

[9] As indicated at the pre-trial conference, Counsel to the Manager filed a declinatory motion in connection with the expiry of the delay of the giving of notice to the Manager by the Beneficiaries for each of the Points 1,2,3 and 4 as well as a declinatory motion for exclusion of guarantee in the case of Point 4, which motions are akin to a motion for dismissal.

PLEADINGS - MANAGER

[10] Counsel to the Manager submitted that the Beneficiary did not respect the delay for denunciation of the defects claimed for each of the Points under review, as indicated in the Decision.

[11] Counsel to the Manager also reaffirmed the position indicated in the Decision for purposes of Point 4 thereof and the exclusion under the Guarantee Plan for elements of claim or situations derived therefrom where repairs have been effected by the Beneficiaries prior to an inspection by the Manager, which in his view coverage may then only be entertained, and not cause an exclusion of guarantee, in circumstances of situation of urgency; the Manager contended that the lack of air conditioning was not a situation of urgency.

PLEADINGS - BENEFICIARIES

[12] The Beneficiaries described briefly the damages identified under Points 1, 2 and 3 of the Decision and cross-examined representatives of the Manager and of the Contractor and indicated that they did not file their claim prior to its date because the Contractor would come to effect certain repairs, that there were in various instances delays to do so, but that visits and certain corrective measures were effected, indicating further that some did not solve the problems then identified to the Contractor.

PLEADINGS – CONTRACTOR

[13] The Contractor indicated that it had effected certain repairs even if same where not further covered by the Guarantee Plan, such as on the front columns, but that the Beneficiaries must understand the basis of coverage of same which does not cover their claims under review.

ISSUES

[14] Taking into consideration the facts of this case, the preliminary objections filed and the applicable provisions of the Regulation and corresponding clauses of the Guarantee Plan, when applicable, the following issues must be initially considered:

[14.1] Is the necessity of a notice to be given in writing to the Contractor and the Manager as provided under various paragraphs of section 10 of the Regulation of a procedural nature or otherwise?

[14.2] What is the nature of the delay "…within a reasonable time not to exceed 6 months…" provided under various paragraphs of section 10 of the Regulation?

14.2.1 Delay of procedure or of prescription?

14.2.2 Peremptory delay?

14.2.3 If so, is such delay one of forfeiture, foreclosure?

[14.3] 14.3.1 What are the consequences of exceeding this 6 months?

14.3.2 May the Court exercise any discretion in favour of the Claimant, including in circumstances where there may have been an impossibility in fact to act within the delay to be considered, taking into consideration the position taken by the Beneficiaries that the actions of the Contractor led them to delay the filing of their denunciation?

[14.4] In the event a Point has been denounced within the applicable delay, are there other elements of the preliminary objections that apply to prevent further consideration on the merits?

ANALYSIS

General Rule of Interpretation

[15] Before addressing the crux of this arbitration, and taking into consideration that we shall use provisions of the Civil Code of Procedure[2] (sometimes "**C.C.P.**") to supplement in part our analysis of the provisions under study, it is appropriate to review briefly what are guiding principles in my view in cases where certain matters may be understood by some as procedural in nature and of a more substantive nature by others and where one must consider that the general rule of interpretation of the C.C.P. must be that of a liberal approach save specific exceptions.

[16] The Supreme Court of Canada has in several instances underlined the liberal approach that must be the general rule of interpretation, *inter alia* under the pen of Pigeon J., commenting on the 1965 reform of the Code of Civil Procedure:

[2] R.S.Q. c. C-25

> "In my opinion, it is important to intervene to ensure compliance with the intention of the Quebec legislator to repeal the old maxim that "form takes precedence over substance".[3]

[17] In effect, the Supreme Court has taken a constant approach in support of a liberal interpretation of procedure, not only in these *Hamel* and *Duquet* cases, but also including under the pen of Pratte J. in *Cité de Pont Viau v. Gauthier Mfg. Ltd.*, [1978] 2 S.C.R. 516 which focuses on art. 494 and 523 C.P.C. or more recently under the pen of L'Heureux Dubé J., which focuses in part on art. 523 C.C.P., on an extension of the incidental appeal time limit beyond six months from the date of the judgment provided under art. 500 C.C.P. [4]

[18] We will provide *inter alia* an analysis of art. 523 C.C.P. below and its impact on a comparative basis with other articles of the Code of civil Procedure to the case at bar.

[19] This approach has also been noted by our Court of Appeal (Quebec), including by Gendreau J.C.A.[5] who made a review of several cases in the often referred case of *Têtu c. Bouchard* [6] and stated on a motion under then art. 481.11 C.C.P [7]:

> "La Cour suprême a plusieurs fois rappelé à notre Cour que, malgré la rigueur du texte de procédure, la sauvegarde des droits de la partie, même et peut-être surtout, si son avocat fut négligent, devait demeurer le souci premier d'un juge si le redressement recherché ne cause aucun préjudice à l'adversaire (Québec Communauté Urbaine c. Services de santé du Québec, [1992] 1 R.C.S. 426; St-Hilaire c. Bégin, [1981] 2 R.C.S. 79; Bowen c. Ville de Montréal, [1979] 1 R.C.S. 511; Cité de Pont Viau c. Gauthier Mfg. Ltd, [1978] 2 R.C.S. 516)." [8]

[20] In summary of this introduction commentary, the Court should approach the interpretation of situations where a litigant is losing his rights with a view to reject unjust formalism and, unless otherwise compelled to do so, to safeguard the rights of the parties.

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[3] *Hamel v. Brunelle and Labonté*, [1977] 1 S.C.R. 147, pp.153-154 and similarly in *Duquet v. Town of Sainte-Agathe-des-Monts* [1977] 2 S.C.R. 1132.

[4] Québec (Communauté urbaine) *v.* Services de santé du Québec, [1992] 1 S.C.R. 426

[5] (in a minority opinion ~ minority for reasons that do not affect this statement)

[6] Têtu c. Bouchard, 1998 CanLII 12993 (QC C.A.) ; [1998] R.J.Q.

[7] Repealed in 2002 under this article, pertaining to filing within 180 days of an inscription.

[8] Reference is also made by Gendreau J. to other judgments, including Construction Paquette c. Entreprises Vego, [1997] 2 R.C.S. 299 of the Supreme Court of Canada.

Applicable regulatory provisions

[21] It is now appropriate at this point to review the various possible applicable provisions for this case found under section 10 of the Regulation providing coverage for buildings not held in co-ownership:

> 10. The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations after acceptance of the building, shall cover:
>
> […]
>
> (3) repairs to non-apparent poor workmanship existing at the time of acceptance or discovered within 1 year after acceptance as provided for in articles 2113 and 2120 of the Civil Code of Québec, and notice of which is given to the contractor and to the manager in writing within a reasonable time not to exceed 6 months following the discovery of the poor workmanship;
>
> (4) repairs to latent defects within the meaning of article 1726 or 2103 of the Civil Code of Québec which are discovered within 3 years following acceptance of the building, and notice of which is given to the contractor and to the manager in writing within a reasonable time not to exceed 6 months following the discovery of the latent defects within the meaning of article 1739 of the Civil Code of Québec; and
>
> (5) repairs to faulty design, construction or production of the work, or the unfavorable nature of the ground within the meaning of article 2118 of the Civil Code of Québec, which appears within 5 years following the end of the work, and notice of which is given to the contractor and to the manager in writing within a reasonable time not to exceed 6 months after the discovery or occurrence of the defect or, in the case of gradual defects or vices, after their first manifestation.

The underlines are ours.

[22] The Court also takes note of the following section of the Regulation:

> "18. Any claim based on the guarantee referred to in section 10 is subject to the following procedure:
>
> (1) within the guarantee period of 1, 3 or 5 years, as the case may be, the beneficiary shall give notice to the contractor in writing of the construction defect found and send a copy of that notice to the manager in order to suspend the prescription;" [9]

The underlines are ours.

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[9] O.C. 841-98, s. 18; O.C. 39-2006, s. 6.

[23] It must be noted that the text applying a requirement of a written notice within a delay of six months is of identical effect for non-apparent poor workmanship, latent defects, faulty design, construction or production of the work or the unfavorable nature of the ground and consequently it is not necessary at this juncture, for some of the Points under review, to classify the problems or defects claimed to determine if denunciation has been made in accordance with the delay provided for by the Regulation.

Comparative Analysis provisions

[24] The legislator has enacted various provisions under the Code of Civil Procedure which contain similar language and concepts to those under study in the Regulation. It is of importance in my view to analyse same and draw from the doctrine and jurisprudence that have reviewed same.

[25] A first set of provisions provide for applications for leave to appeal and the discretion of the Court of Appeal to grant special leave in certain circumstances:

> 494. An application for leave to appeal …must be presented by motion…
>
> The motion must be served on the adverse party and filed with the office of the court within 30 days of the date of judgment …
>
> ….
>
> Such time limits are peremptory and their expiry extinguishes the right of appeal."[10]
>
> …..

and

> "523. The Court of Appeal may, notwithstanding the expiry of the time allowed by article 494, but provided that more than six months have not elapsed since the judgment, grant special leave to appeal to a party who shows that in fact it was impossible for him to act sooner. …"[11]

The underlines are ours.

[26] These provisions are of special interest as the arbitration provided in the Regulation is of the nature of an appeal from the decision of the Manager, and as they address several of the concepts of the case at bar, being (i) the notice in writing to the contractor and the Manager which is reflected by the service under art. 494 on the other party and the filing with the

[10] Code of Civil Procedure, 1965 (1st sess.), c. 80, a. 494; 1969, c. 80, s. 9; 1982, c. 32, s. 35; 1983, c. 28, s. 19; 1989, c. 41, s. 1; 1992, c. 57, s. 285; 1993, c. 30, s. 6; 1995, c. 2, s. 3; 1995, c. 39, s. 3; 1999, c. 40, s. 56; 2002, c. 7, s. 91

[11] Code of Civil Procedure, 1965 (1st sess.), c. 80, a. 523; 1985, c. 29, s. 11; 1999, c. 40, s. 56; 1999, c.46, s. 12; 2002, c. 7, s. 97

office of the court, (ii) that these provisions are peremptory and of forfeiture, and (iii) the concept of a maximum delay of no more than six months *i.e.* “more than six months have not elapsed” under art. 523.

[27] A second provision of interest is art. 484 C.C.P. which provides that motions in revocation in cases where a party was condemned by default to appear or to plead, if he was prevented from filing his defence in certain circumstances, or in cases where a party has no other useful recourse against a judgment, may be presented to the court and reads in part as follows:

> “484. The motion in revocation, served on all the parties in the record … must be filed within 15 days counting, according to the circumstances, from the day …
> …
> [Third paragraph]. The time limit of 15 days is peremptory; nevertheless the court may, on motion and provided that not more than six months have elapsed since judgment, relieve from the consequences of his default the party who shows that, in fact, it was impossible for him to act sooner.”[12]

The underlines are ours.

Nature of notice under section 10 of the Regulation to Contractor and Manager

[28] What is the nature of the notice in writing? Is it of a procedural nature only or is it an element of a more substantive nature?

[29] The interpretation given to article 1739 [13] of the Civil Code of Québec (“**C.c.Q**.”)[14] is a first element of response:

> “1739. A buyer who ascertains that the property is defective may give notice in writing of the defect to the seller only within a reasonable time after discovering it. The time begins to run, where the defect appears gradually, on the day that the buyer could have suspected the seriousness and extent of the defect.”

[30] The authors have viewed this notice as a extra judicial demand subject to art. 1595 C.c.Q.:

> “The extrajudicial demand by which a creditor puts his debtor in default shall be made in writing.”

[12] Code of Civil Procedure, 1965 (1st sess.), c. 80, a. 484; 1999, c. 40, s. 56.
[13] See also the reference to art. 1739 under section 10 paragraph 4 of the Regulation.
[14] Civil Code of Québec (L.Q., 1991, c. 64)

and while contrary to certain jurisprudence in other circumstances, authors[15] and the Courts[16] have considered the notice under art. 1739 to be specifically required to be in writing, and to be imperative and essential in nature.

[31] The courts have in several occasions[17] identified that the notice under 1739 C.c.Q. has a specific character of a denunciation and even made distinctions between the extra judicial demand and the denunciation on the basis of their respective objectives[18] and I am of the view that this applies to the notices to the Manager under section 10 of the Regulation.

[32] The Supreme Court has also addressed this issue under a service mechanism in the case of an appeal procedure, which I believe is specifically relevant as I have mentioned earlier, the arbitration provided in the Regulation is, in my view, of the nature of an appeal from a decision of the Manager.

[33] The undersigned notes that this is under the same case law that supports the general rule of liberal interpretation referred hereinabove, and more particularly by L'Heureux Dubé J. (and before her by Pratte J.) as reflected in the following extract from *Québec (Communauté urbaine) v. Services de santé du Québec* [19]:

> "This having been said, it is clear that, barring undue formalism, the peremptory provisions of the *Code of Civil Procedure* must be observed, as procedure judiciously applied provides an additional guarantee that the rights of litigants will be respected. This is especially true in the context of an appeal because, as the majority of the Court of Appeal pointed out, the right of appeal is a statutory creation, the very existence of which is subject to precise rules. This is what Pratte J. held in *Cité de Pont Viau v. Gauthier Mfg. Ltd.*, [1978] 2 S.C.R. 516, upholding the Court of Appeal on this point, when he wrote at p. 519:
>
>> An appeal is brought only if, within the time limit provided for in art. 494 C.C.P., the inscription is filed with the office of the court of first instance and served upon the opposing party or his counsel. In the case at bar, though the inscription was filed with the office of the Superior Court, it was never served upon respondent or its counsel. One of the two steps essential to the bringing of the appeal was therefore missing; this is not a mere formality that the Court of Appeal could allow to be corrected (art. 502 C.C.P.)."

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[15] Luelles and Moore, Droit des obligations, Éditions Thémis, no. 2800 (and note 38 *in fine*) - 2803

[16] See *Voyer c Bouchard* (C.S. 1999-08.27) [1999] R.D.I. 611; and also *Fleurimont c. APCHQ inc.* (C.S. 2001.12.19) in this latter case, the facts precede the adoption of the Regulation and the then APCHQ certificate of guarantee required conciliation, but the principles on notice remain applicable *in extensio*.

[17] Idem, *Voyer c Bouchard*; see also *L'Espérance c Bernstein*, (C.Q. 2000.12.12); *Dubé c Bourassa* (C.Q. 2004.06.28).

[18] *Dionne c. Guay* (C.Q. 2004.03.04) B.E. 2004 BE-414.

[19] Idem, note 5.

The underlines are ours.

[34] The notice in writing to be given to the Manager in accordance with section 10 of the Regulation is in effect a denunciation, it must be in writing, it is essential and imperative, and a substantive condition precedent to the right of the Beneficiary to arbitration.

Nature of six month delay under various paragraphs of section 10

[35] Under cross-examination by counsel to the Manager, the Beneficiaries admitted that their denunciation to the Manager was in excess of six (6) months following the discovery or occurrence of the elements claimed by them under Points 1,2 and 3, initially by (i) admission that the problem under Point 1 was known to them from the spring of 2007 (and documentary proof of receipt of the Beneficiaries' claim by the Manager has not been challenged), and consequently this represents a delay between discovery or occurrence and denunciation of more than fifteen (15) months for such Point, and (ii) by a general admission by the Beneficiaries in their pleadings that their error was to have advised the Manger too late, as the case may be, but in my view, this general comment did not encompass the delay under Point 4, for which at various instances the Beneficiaries claimed that the problem occurred only from approximately May 2008 (and no contrary evidence was put forth before the Court) and consequently less than two (2) months between discovery and denunciation.

[36] The Court also notes the admission as to discovery or occurrence under the Registered Letter of claim from Beneficiaries to Contractor (Exhibit A-6 *en liasse*), last paragraph:

> " Items A, B and C have been an issue for 1 ½ years…"

where A, B and C refer to Points 1, 2 and 3 respectively.

[37] It is essential at this time, prior to any analysis of other matters which may be raised herein, to determine the appropriate application of this six (6) month rule submitted as the maximum delay for notice to be given in writing to the Contractor and the Manager for coverage under the Guarantee Plan (in as much as the other conditions of application are also met).

[38] The Court has noted arbitration awards [20] which tend to support the fact that the delay of six (6) months under review may not be extended and also notes the recent decision rendered by our learned colleague Me Michel Jeanniot in *Jobin et Plourde et Carrefour St-Lambert Lemoyne Inc. et La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc.*[21]

[39] Counsel to the Manager has submitted jurisprudence in support of his position under the pen of the undersigned [22] where I addressed the question of the delay of denunciation and made reference inter alia to another prior decision of the undersigned on the same question [23].

[40] The gist of the cited decisions by my learned colleagues MMrs. Fournier, Dupuis, Labelle and Jeanniot is to the effect that, in each case based on the circumstances before them, the written notice of the denunciation had to be given to the contractor and the manager within the six (6) months from the discovery or occurrence of the defects. I must concur with the conclusions reached on the delay, subject to further considerations by the Court which may differ from those of my colleagues and which I feel obliged to address taking into consideration some of the facts of the case at bar.

Delay of procedure or of prescription?

[41] The nature of the six month delay must be distinguished from the delay to send an application for arbitration within 30 days following receipt of the manager's decision which the beneficiary may wish to dispute, as decided by the Superior Court (Québec) which determined that this 30 days delay (then of 15 days) under section 107 of the Regulation was a delay of procedural nature and could be subject to extension [24]

[42] In furtherance to my decision herein, I wish to emphasize the position taken by the Court of Appeal (Quebec) and the Supreme Court of Canada on similar provisions and the consequent conclusion that this Court has

[20] *Syndicat de copropriété du 4570-4572 de Bréboeuf Inc. c. Construction Précellence Inc. et La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc.,* Soreconi No. 050512002, Alcide Fournier, Arbitre, 5 Septembre 2005.
Paul Blanchette Construction et Letiecq et La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc., Le Groupe d'arbitrage et de médiation sur mesure (GAMM), Dossier APCHQ 025391, Claude Dupuis, ing., Arbitre, 14 octobre 2005.
Chackal et Bardakji et La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc., Henri P. Labelle, arch., Arbitre, 5 mai 2006.

[21] Soreconi No. 061215001, 8 mars 2007.

[22] *Apollonatos & Karounis c. Habitations Luxim Inc. and La Garantie des Maisons Neuves de l'APCHQ,* Centre Canadien d'Arbitrage Commercial, Dossier S07-112801-NP, Me Jean Philippe Ewart, Arbitre, 4 juin 2008.

[23] *Danesh c. Solico Inc. et La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc.* Soreconi No. 070821001, Me Jean Philippe Ewart, Arbitre, 5 mai 2008.

[24] Takhmizdjian and Bardakjian v. Soreconi and Betaplex inc. and APCHQ, No. 540-05-007000-023 (9 July 2003).

derived that the six (6) month delay provided under the applicable provisions of section 10 of the Regulation.

[43] In several decisions[25], the Quebec Court of Appeal has rejected, on the basis that more than six months had elapsed from the appropriate date, motions for revocation of judgment under the principles found under article 484 C.P.C. (see above), which reads in part "…the court may, on motion and provided that not more than six months have elapsed since judgment relieve from the consequences…".

[44] More particularly, the Quebec Court of Appeal writes on the subject of the six month delay provided under the third paragraph of article 484 C.p.c. under the pen of Delisle, J.C.A.[26]:

> "Malheureusement, ce n'est que […], en dehors donc de ce dernier délai [*note : délai de six mois prévu à l'article 484*] que l'avocat de l'appelant a demandé au tribunal que son client soit relevé des conséquences du retard à agir.
> Comme il s'était écoulé plus de six mois, le juge de première instance a accueilli le moyen d'irrecevabilité invoqué par l'intimée.
> Il a eu raison.
> Contrairement au délai de 15 jours de l'article 484 qui, a certaines conditions, n'est pas fatal, le délai de six mois du même article et celui de l'article 523 C.p.c. sont des délais de prescription."
>
> "Unfortunately, it is only […] outside this last delay [*note : six months delay set forth in article 484*] that counsel for the appellant requested from the tribunal that his client be absolved of the consequences of his delay in taking action.
> As more than six months have elapsed, the first instance judge granted the motion for dismissal submitted by the respondent.
> He was right.
> Contrary to the 15 day delay of article 484 which, under certain conditions, is not fatal, the six month delay of the same article as well as the one of article 523 C.P.C. are delays of prescription. "

Translation and underline by the Court.

[45] The Quebec Court of Appeal classifies the six month delay as a delay in the nature of prescription. Delisle J.C.A. cites Justice Pratte of the Supreme Court of Canada in the case *Cité de Pont Viau c. Gauthier MFG Ltd.*[27] which addresses the application of article 523 C.p.c. which contains a similar provision as article 484 C.p.c. and similar to the concept under review in section 10 of the Regulation, and reads:

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[25] See *Laurendeau c. Université Laval,* Quebec Court of Appeal No. 200-09-003399-000 (200-05-000225-933), 28 February 2002; see also *Balafrej c. R.*, 2005 QCCA 18.
[26] *J.P. c. L.B.*, Quebec Court of Appeal No. 500-09-012743-027 (500-12-249425-996), 14 March 2003, pp.3 and 4.
[27] Supra, 1978 [2] S.C.R. 516; 1978 CanII 4 (Supreme Court of Canada).

"523. The Court of Appeal may, notwithstanding the expiry of the time allowed by article 494, but provided that more than six month have not elapsed since the judgment, grant special leave to appeal to a party who shows that in fact, it was impossible for him to act sooner. […]" [28]

The underline is ours.

[46] Justice Pratte writes[29] that the delay of six months under 523 C.p.c., which deals with the delay for leave to appeal, crystallize the *res judicata*, the fact that the judgment is final, i.e. no longer subject to appeal:

"Article 523 *C.C.P.* specifically empowers the Court under special circumstances to grant special leave to appeal within six months of the judgment. It is therefore only after this six-month period has elapsed that a Superior Court judgment acquires the same force of *res judicata* that it had under the old *Code af*ter thirty days".

[47] It may be said that the wording and intent of section 10 of the Regulation "…time not to exceed 6 months after the discovery …or occurrence … or first manifestation… " may at least be considered as stringent as the delay wording of articles 484 and 523 C.p.c.

Delay of forfeiture – "déchéance ~ préfix"

[48] Is this a delay under which the Beneficiaries may benefit from suspension or interruption of prescription?

[49] The Court is of the view that the six month delays under section 10 of the Regulation are each in the nature of a delay of forfeiture. Furthermore, there are distinctions that has led the authors and the courts to identify certain elements that are specific to delays of forfeiture, with the remainder non-contradictory provisions of prescription to remain applicable to prescription. We must now review these elements.

[50] Article 2878 C.c.Q. under Book Eight, Prescription, under Rules governing Prescription, General Provisions states:

"The court may not, of its own motion, supply the plea of prescription. However, it shall, of its own motion, declare the remedy forfeited where so provided by law. Such forfeiture is never presumed; it is effected only where it is expressly stated in the text." *The underline is ours.*

[51] The Court of Appeal has indicated[30] that the delay of forfeiture must be expressed in a clear, precise and unambiguous way. This jurisprudence

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[28] Article 494 C.p.c. provides that a motion for leave to appeal must be served and filed, save certain exceptions, within 30 days of the date of judgment.

[29] Id. 527 and 528

confirms the position taken by authors, more specifically Jean Louis Baudouin, in *Les Obligations* [31] :

> “Le second alinéa de cette disposition [2878] précise que la déchéance ne se présume pas et doit résulter d’un texte exprès. Il n’y a donc désormais comme seuls délais préfix véritables que ceux à propos desquels le législateur s’est exprimé de façon précise, claire et non ambiguë”.
>
> “The second paragraph of this provision [2878] provides that forfeiture may not presume and must result from a specific text. Consequently, there are now only real prefix delays those for which the legislator has expressed himself in a precise, clear and unambiguous fashion. ”
>
> *Translation by the Court*

[52] The Court of Appeal has also determined that it is not necessary to have the words forfeiture or foreclosure specifically mentioned in a text [32] but that:

> “…, une mention formelle du terme “déchéance “ ne me parait pas obligatoire. Il faut cependant que l’intention du législateur est d’en faire un tel délai. ” [33]
>
> “…, a formal indication of the word forfeiture does not seem mandatory. It is nevertheless necessary that the intent of the legislator was to create such a delay.” *Translation by the Court*

[53] The Court of Appeal, more specifically Jean Louis Beaudouin, as J.C.A., interestingly in furtherance of his views as an author that the text must be clear, precise and unambiguous reflected under our par. 49 herein, also confirms same in the unanimous decision *Massouris et Honda Canada Finance Inc. (Re) (Syndic de)*, 2002 CanLII 39140 (QC C.A.), determining that the delay of publication under article 1852 C.c.Q:

> 1852. […].
> [Second paragraph] Publication is required, however, in the case of rights under a lease with a term of more than one year in respect of a road vehicle or other movable property …; effect of such rights against third persons operates from the date of the lease provided they are published within 15 days. [34]

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[30] *Entreprises Canabec inc. c. Laframboise*, J.E. 97-1087 (C.A.). where the Court determined that in the case of 524C.C.P. there was no forfeiture; see also: *General Motors of Canada Ltd c. Demers*, [1991] R.D.J. 551 (C.A.)

[31] Baudouin, Jean-Louis ; Jobin, Pierre-Gabriel. – Les obligations. – collaboration de Nathalie Vézina. – 6e éd. – Cowansville (Québec) : Éditions Y. Blais, ©2005, p. 1092, no. 1087.

[32] Such as articles 1103 C.c.Q. (co-ownership) or 1635 C.c.Q. (Paulian action) where the text is specific.

[33] *Alexandre c Dufour*, [2005] R.D.I. 1 (C.A.), par. 34, the Court evaluating the right of exclusion from indivision by an co-owner within 60 days of learning that a third party has acquired the share of an undivided co-owner as provided under art. 1022 C.c.Q.

[34] 1991, c. 64, a. 1852; 1998, c. 5, s. 8.

is a delay of forfeiture.

[54] The same confirmation may be found on other provisions reviewed by the Court of Appeal[35], such as article 2050 C.c.Q. which states in the case of an action in damages against a carrier:

> 2050. Prescription of any action in damages against a carrier runs from the delivery of the property or from the date on which it should have been delivered.
>
> The action is not admissible unless a notice of the claim is priorly given to the carrier in writing within 60 days after the delivery of the property, whether or not the loss is apparent, or if the property is not delivered, within nine months after the date on which it was sent. No notice is required if the action is brought within that time.
>
> *The underline is ours*

[55] The Court is of the view that the six month delays under section 10 of the Regulation are each in the nature of a delay of forfeiture, delays of forfeiture are of public order and extinguish the right of the creditor of the obligation[36] and consequently extinguish the right of the Beneficiaries to require the coverage of the Guarantee Plan.

[56] One of the consequence of forfeiture, the foreclosure of the right to exercise a particular right, in our case as the Manager is concerned the right of the Beneficiaries to require the coverage of the Guarantee Plan, is not subject to the provisions of suspension or interruption applicable in certain circumstances to delays of prescription:

> "… alors qu'un délai de prescription peut être suspendu et interrompu (articles 2289 et s.), …, la solution contraire prévaut pour le délai de déchéance, qui éteint le droit de créance dès que la période est expirée sans que le créancier est exercé son recours et quoi qu'il arrive. Le titulaire du droit, de ce fait, ne peut même plus invoquer celui-ci par voie d'exception. "[37]
>
> "… while a prescription delay may be suspended or interrupted (art. 2289 and following), …., a contrary solution applies to the delay of forfeiture, which extinguishes the creditor's right as soon as the period for the creditor to exercise his right is lapsed, and whatever happens afterwards. The holder of this right may then not even invoke the latter by any means of exception. " *Underline and Translation by the Court*

Impossibility to act – May the six month delay be extended by the Court?

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[35] Équipement Industriel Robert Inc. c. 9061-2110 Québec Inc., 2004 CanLII 10729 (QC C.A.)

[36] Supra, Baudouin, Jobin – Les obligations – p. 1092, no. 1086.

[37] Idem, pp. 1092 -3, no. 1086.

[57] Can this six month delay be extended by the Court in certain circumstances? In any circumstances? We must answer in the negative.

[58] Some of the decisions of my learned colleagues[38] have highlighted the possibility in certain circumstances to evaluate the impact of an impossibility in fact to act by the Beneficiary, including the error of a counsel or other legal advisor, or the actions or inaction of the Contractor, in order to evaluate the possibility of extending the delay under review. With all consideration for the contrary opinion, I am of the view that the concept of the impossibility in fact to act does not find application under section 10 of the Regulation.

[59] In the case at bar, we must distinguish from these decisions that pertained to provisions where the impossibility to act was specifically mentioned by the legislator in the body of the provision, such as the provisions we have reviewed herein:

> Art. 523 C.C.P. : "…grant special leave to appeal to a party who shows that in fact it was impossible for him to act sooner",

or

> Art. 484 C.C.P.: "… relieve from the consequences of his default the party who shows that, in fact, it was impossible for him to act sooner."

or, recently by the Court of Appeal [39] under article 110.1 C.C.P.[40] which reads:

> "[Third paragraph] …failure to act within the time limit upon proof that it was in fact impossible for the party to act within the time limit."

[60] It is clear, as the Court of Appeal has recently confirmed, under the pen of Thibault J.C.A.,

> "Enfin, le législateur n'a pas cru bon d'adopter certaines mesures d'atténuation du principe telle, par exemple, la prolongation du délai en cas d'impossibilité d'agir, comme il l'a fait pour d'autres institutions. " [41]
>
> "Finally, the legislator has not considered appropriate to enact certain measures of reducing the severity of the principle, such as an extension of the delay in the case of an impossibility to act, as provided under other legislative provisions."
>
> *Translation by the Court*

that the absence of the concept of impossibility to act under section 10 of the Regulation prevents the Court to temper the failure to act by any consideration of either failure by the Beneficiaries, and under the

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[38] *Infra,* notes 20 and 21.

[39] Québec (Sous-ministre du Revenu) c. Stever, 2007 QCCA 257

[40] 2002, c. 7, s. 14; 2004, c. 14, s. 1

[41] *Supra*, Alexandre c Dufour, par. 43.

parameters of section 10 of the Regulation, any action or omission by the Contractor.

Further consideration under Point 4

[61] The Beneficiaries have indicated, and no contrary evidence has been placed before the Court, that they discovered the problem with the heat pump in May 2008, and having denounced same at the latest in August 2008, the denunciation is within the applicable delay. The Court must turn its attention to the Manager's second motion hereunder as to Point 4 having only been denounced in the fourth (4th) year from the date of acceptance of the building by the Beneficiaries, the coverage of the Guarantee Plan is only available if the problem is one provided for under paragraph 5 of section 10 of the Regulation which reads:

> "…faulty design, construction or production of the work, or the unfavourable nature of the ground within the meaning of article 2118 of the Civil Code of Quebec…"

[62] The Court was informed that there was a problem with the heat pump (Point 4) which then prevented its normal operation and same was repaired by an electrician called upon by the Beneficiaries, but no more. No evidence was introduced to give any characterization to this problem. Taking into consideration the general nature of a heat pump and the information provided that the operation thereof was then for air conditioning purposes, and the fact that Point 4 has only been denounced in the fourth (4th) year from the date of acceptance of the building by the Beneficiaries, there are no elements which may lead the Court to determine that this may fall into the ambit of paragraph 5 of section 10 of the Regulation and the Court concurs therefore with the determination made under the Decision for such purposes on this Point 4 and finds that the Guarantee Plan does not find application for Point 4.

[63] Taking into consideration the determination made by the Court as to Point 4 above, there is no need for the purposes hereof to review the position put forth by the Manager as to the exclusion of guarantee pursuant to section 6.7.3 of the Contract.

CONCLUSIONS

[64] In conclusion, this Court is of the view that, as it pertains to the delay of denunciation under review:

[64.1] The notice in writing to be given to the Contractor and the Manager in accordance with section 10 of the Regulation is in effect a denunciation, it must be in writing, it is essential and imperative, and, as the Manager is concerned, is a substantive condition precedent to the respective rights of the Beneficiaries

to require the coverage of the Guarantee Plan and to require arbitration in connection thereto.

[64.2] The six (6) month delays under section 10 of the Regulation are each in the nature of a delay of forfeiture, delays of forfeiture are of public order and the failure by the Beneficiaries to give notice to the Manager in writing within such delay of six months extinguish the respective rights of the Beneficiaries to require the coverage of the Guarantee Plan and to require arbitration in connection thereto.

[64.3] The foreclosure of the rights of the Beneficiaries by the expiry of the six (6) month delays under section 10, as the Manager is concerned, to have the Beneficiaries require the coverage of the Guarantee Plan and to require arbitration respectively, are not subject to the provisions of suspension or interruption applicable in certain circumstances to delays of prescription.

[64.4] The Court does not have discretion to extend the six (6) month delays under section 10, including under "an impossibility to act" concept which does not find application under section 10 of the Regulation.

[65] Consequently, the denunciations to the Manager by the Beneficiaries of the problems which are the subject of their demand for arbitration as it pertains to Point 1, 2 and 3 were respectively made outside the six (6) month delay provided under the applicable provisions of section 10 of the Regulation and this delay is a delay of forfeiture, which this Court does not have the discretion of extending and which causes foreclosure of the Beneficiaries' rights for such Points.

[66] I wish to underline that the decision of this Court is solely in application of the Regulation and does not purport in any manner to provide a decision under any other applicable legislation which may find application to the facts of this case. This decision is therefore without prejudice to the rights of the Beneficiaries to bring any action before the civil courts having jurisdiction, subject to the applicable rules of law.

[67] In accordance with section 123 of the Regulation, and as the Beneficiaries have failed to obtain a favorable decision on any of the elements of their claim, the Court must determine the division of the fees to be charged between the Manager and the Beneficiary.

[68] Consequently, the cost and fees of this arbitration, as well under law as under equity, in accordance with sections 116 and 123 of the Regulation, shall be apportioned as to $50 to the Beneficiary and the remainder to the Manager.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

[69] **GRANTS** the preliminary declinatory motions introduced by the Manager as to dismissal of the arbitration demand of the Beneficiaries for Points 1, 2, 3 and 4 of the Decision, being all of the Points under the Decision;

[70] **DISMISSES** the arbitration demand and claims thereunder of the Beneficiaries;

[71] **ORDERS** in accordance with section 123 of the *Regulation* that the costs of the present arbitration be borne as for $50.00 by the Beneficiary and for the remainder by the Manager.

DATE: 2 February 2009

Me Jean Philippe Ewart
Arbitrator